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THE GENIUS OF THE COMMON LAW.

I. OUR LADY AND HER KNIGHTS.

MORE than seven years have passed since I was invited to speak here in the name of our Common Law. The renewal of such an invitation is if possible more honorable than its first proffer, and it would seem a simple matter to accept it with alacrity. But it comes from the young, nay from the immortals—for are not incorporate universities immortal?—to a man who must soon be irrevocably called old if he is not already so; a man at whose age the lapse of days gives a little more warning of some kind at every solstice, and whom it tells among other things that his outlook on life and doctrine is pretty well fixed for better or worse. Such a man cannot expect to acquire fresh points of view or to frame novel conceptions of any value. He may hope, at best, to keep an open mind for the merits of younger men's discoveries; to find in the store of his experience, now and then, something that may help them on the way; to sort out results of thought and observation not yet set in order, and make them of some little use, if it may be, to his fellow-students; perhaps even to bring home to some others the grounds of his faith in the science of law, the faith that it has to do not with a mere intellectual craft but with a vital aspect of human and national history.

When I say human, I mean to lay on that word rather more than its bare literal import. I mean to rule out, so far as one man can do it, the old pretence that a lawyer is bound to regard the system he was trained in, whether it be the Common Law or any other, as a monster of inhuman perfection. Indeed the whole theme of these lectures will include as one chief purpose the development of this protest. Laymen may still be found to say in bewilderment or disappointment, as Mr. Justice Hillary said, we

may presume in jest, towards the middle of the fourteenth century, that law is what the justices will; and we are still ready to reply with his brother judge Stonore: "No: law is reason."¹ Reason let it be, the best we can discover in our day. But the dogmatic assertion that law is the perfection of reason belongs to a later age, an age of antiquarian reverence often falling into superstition and of technical learning often corrupted by pedantry. We are here to do homage to our lady the Common Law; we are her men of life and limb and earthly worship. But we do not worship her as a goddess exempt from human judgment or above human sympathy. She is no placid Madonna sitting in a rose garden; rather she is like the Fortitude of the Florentine master, armed and expectant, her battle-mace lightly poised in fingers ready to close, at one swift motion, to the fighting grasp. Neither is she a cold minister of the Fates. Her soul is founded in an order older than the gods themselves, but the joy of strife is not strange to her, nor yet the humours of the crowd. She belongs to the kindred of Homer's gods, more powerful than men but not passionless or infallible. She can be jealous with Hera, merciless with Artemis, and astute with Athena. She can jest with her servants on occasions. I would not warrant that she hid her face, any more than Queen Elizabeth would have done, even at those merry sayings of Chief Justice Bereford which Maitland might not translate. She has never renounced pomps and vanities. On the contrary, she delights in picturesque variety of symbols and ceremonial up to the point where it becomes inconvenient, and sometimes a little way beyond. Her expounders may dwell on forms with a certain loving solemnity, as Littleton where he says: "Homage is the most honourable service, and most humble service of reverence, that a frank tenant may do to his lord." But they need not always be solemn. Our lady was not enthroned in the Middle Ages for nothing. Like a true medieval clerk, she can indite an edifying tale or a devout comment and make a grotesque figure in the margin. Yet I have known good English lawyers who can see nothing but barbarism in the Middle Ages. I suspect those learned friends of being, I will not say possessed, but in some measure obsessed, by the enemy; not a medieval fiend with horns and claws, but a more dangerous one, the polished and scholarly Mephistopheles of the

¹R. Thorpe (*arg.*) . . . autrement nous ne savons ceo qe la ley est.—HILL. Volunte des Justices.—STON-NAUGH; ley est resoun. Y. B., 18-19 Ed. III (A. D. 1345), ed. Pike (Rolls series, 1905), p. 378.

Romanizing Renaissance. Once he broke his teeth, as Maitland has shown us, on the tough law that the Inns of Court had made. But he is not dead, and our lady the Common Law has had other brushes with him, and may have shrewd ones yet. Now this brings me to the pith and sum of my enterprise, which is to consider her adventures in these and other perils, early and late: adventures of heroic mould and beyond any one man's competence, but not so facile as to be wanting in dramatic interest, or to fail of mixing warning with ensample. We shall find her achievements and her mishaps not less varied than those of pilgrims or knights errant in general, some of them, I think, as surprising as anything in romance. She has faced many foes and divers manner of weapons; she knows as much as Bunyan's Christian of Apollyon's fiery darts and Giant Despair's grievous crab-tree cudgel.

Some one, however, may say that if we consider our lady the Common Law too curiously, we may move another kind of curiosity to profane questioning whether she is a person at all; and if we fail to prove her reality (which probably cannot be done to the satisfaction of a common jury of lay people), peradventure we may be in mercy for bringing her into contempt as some sort of *persona ficta*, or yet worse, that useless figment of shreds and patches, a corporation sole. It may be safer to drop romance for a time and betake ourselves to the usual abstraction of serious discourse while not admitting that they bring us much nearer to reality. Wherever we find a named and organic body of any kind, a nation, a church, a profession, a regiment, a college or academic institution, even a club, which has lasted long enough to have a history continued for more than a generation or two, we shall hardly fail to find also something analogous to that which in a single human being is called character; abilities, disposition, usage that may be counted on. Such bodies acquire a reputation in respect not only of capacity, solvency, or businesslike habits, but of taste and temper. They may be enlightened or stupid, pleasant or unpleasant to deal with. In fact collective tradition and custom may give rise in a corporate unit (not confining the attribute to its strictly legal sense) to a stronger and more consistent character than is shown by most individuals. There is no alternative but to say that a commonwealth and all its subordinate and co-ordinate parts are nothing but a concourse of human atoms, and social history nothing more than a succession of accidents; in other words to deny that there is any political or legal science at all beyond a

bare dogmatic analysis of the facts as taken at a given date and assumed (of course falsely) to be stationary. Thus we should be like amateur collectors of minerals, ignoring the structure of the earth and making an arbitrary arrangement of specimens on the shelves of a cabinet. I confess to a deep want of interest in shelves for their own sake. But really discussion seems pretty superfluous here and now; for if the better opinion were that history is a mere *hortus siccus* of documents and anecdotes, there would be no reason why I should be here at all, or, being here, why there should be any one to listen to me. So let us take it as decided, for the purpose of this course at any rate, that we accept the hypothesis of a real continuity. That being our position, we must further take it as true that not only men but institutions and doctrines have a life history. Given, then, an actual moral development (without assuming that it is uniform in direction, or always for the better), we cannot regard it as development of nothing; the facts must express a spiritual unity for us whether we can define it or not. In our Faculty we are taught to beware of definition, and therefore as prudent lawyers we may content ourselves with a symbol. None better occurs to me than the old Roman one of the Genius, a symbolic personage who is not to be conceived exactly as a heathen guardian angel, for he is not only a minister of grace or persuader to virtue, nor invariably favourable. He combines all elements of fortune, and is rather an unseen comrade on a higher plane, *natale comes qui temperat astrum*, than a master or mentor. We may call him a clarified image of the earthly self, a self represented as bringing forth the fruit of its best possible efficiency, but always of its own, not of any better or other qualities than those it actually has. Our Genius may stand also for a protest against another erroneous view, that which, out of zeal to avoid the inconsequence of the mere story-teller, would set up a rigid external fatalism. If this were right, history would be not only inevitable (which everything is when it has happened) but a pure logical deduction from predetermined ideas, if only we had the key to that kind of logic. But it is not so, for the short reason that, even if a superhuman intelligence could formulate a calculus of human action, it could not do so without counting the men. Experience tells us that character does count, whatever else does, and what is more, that it is often decisive at the most critical points. Habit will serve a traveler on the plain road; character is tested when it comes to a parting of the ways. This has noth-

ing to do with any metaphysical controversy. For surely no pleader for determinism will assert that the determining causes of human action are confined to external motives, nor will any sane advocate of free will deny that, when action has to be taken upon one's judgment of what a man is likely to do, some knowledge of his former conduct and his character will be found useful. All the great moralists are at one in ascribing perfect freedom only to the man (if such a man there can be) who may do his pleasure because his will, being wholly purified, can be pleased only in what is right. Such an one is crowned and consecrated his own lord in things both temporal and spiritual, as it was said to Dante when he had passed through Purgatory. He is beyond any particular rules because the very nature of his will is to fulfill all righteousness. His action could be foretold with certainty by any one who knew the facts and had the same sense of right, and yet no man would contend that he is not free. So much passing remark seems to be called for to avoid any charge of meddling with high matters of philosophy beyond the scope of our undertaking. For the rest, we can expect no such good fortune as to meet with ideal types of perfection in our journeyings on the ground of actual history.

In the sense and for the causes I have now shortly set forth, I propose as the general subject of these lectures the Genius of the Common Law. For reasons which seem imperative, I do not propose to handle the matter as a chronicler. A concise history of the Common Law might be a very good thing; I have thought once and again of its possibilities; but if ever the time comes when it can be brought within the compass of eight, ten or twelve lectures, it will be after much more searching and sifting have been done. At present my learned friend Dr. Holdsworth of Oxford has brought us down to the sixteenth century in three substantial but not unhandy volumes. We do not know that he, or any man, could have made the story shorter with safety; we do know that it grew in the author's hands to be a good deal longer than at first he meant it to be; we know too that our time now disposable is short. I shall assume therefore that I speak to hearers not ignorant in a general way of the lines on which our common stock of judicial and legal tradition has been formed. Supposing the road and the country to be known to that extent, we will examine a certain number of the critical adventures our fathers met with in their pilgrimage; we will observe their various fortunes on different occasions, and see what may be learnt for our profit from their success or failure.

We must begin, however, at the beginning. It is easy to say that the law of our modern courts, for most practical intents, is to be found in the decisions and statutes of the last half century or thereabouts and the rest is antiquarianism; and if some people say this in England, I suppose it is at least as often said in America, perhaps with more colour of reason; though even here I would remind learned friends that there have been boundary disputes between States involving interpretation of the original colonial charters and intricate questions of old real property law. But now we are considering the permanent mind and temper of the Common Law, not the particular rules which judges administer to-day. The branches grow indeed, but they have always grown from the same roots; and those roots must be sought for as far back as the customs of the Germanic tribes who confronted the Roman legions when Britain was still a Roman province and Celtic. The description of Tacitus is familiar;² one passage in his "Germania" has been a crux of scholars for generations, and is not yet fully or finally cleared up; but we cannot pass on without a glance at the broad features of the Teutonic institutions as he shows them. We need not dwell on the question how far he purposely made out an exaggerated contrast with the manners of imperial Roman society. No one has charged him with downright invention, and we are concerned here with the type—"the ideal of the Teutonic system" in Stubbs' words—and not with individual cases. Doubtless it was better realized in some tribes and clans than in others; the extent of the variations does not matter for the present purpose. Taking the Germans as described by Tacitus, we find among them a life of great publicity, with personal command only in war time and ultimate decision, as distinct from executive authority and preliminary counsel, in the hands of the free men assembled in arms. The family is monogamous. Morals are simple and, by comparison with Greek or Roman habits, extremely strict;³ for cowardice and effeminate vice there is no mercy. Gambling, on the other hand, is unrestrained, and adventurousness encouraged.

²It may be a great question for ethnologists, but seems irrelevant for us here, whether the people comprised in it were all of like race, and to what extent of unmixed race. Tradition is more important for the matter in hand than actual descent.

³"We may easily discover that Tacitus indulges an honest pleasure in the contrast of barbarian virtue with the dissolute conduct of the Roman ladies; yet there are some striking circumstances that give an air of truth, or at least of probability, to the conjugal faith and chastity of the Germans." Gibbon, c. ix.

Women not only exhort men to valour but are consulted in affairs of weight, though not in public.⁴ The external conditions are as different as can be from those of urban and commercial civilized life as they have existed in modern times and even in the Middle Ages. With so great a change of environment, we might expect the results to have been transformed almost beyond recognition. And yet, when we look at the modern social ethics of Europe and North America, can we fail to recognize a considerable persistence of the type? That persistence was in some respects reinforced by the teaching of the Christian church after the conversion of the Roman empire; in others, on the contrary, Germanic custom has been pretty stubborn in the face of ecclesiastical discouragement. It would seem that the not uncommon practice of treating all the virtues we profess to cultivate as distinctively Christian is not altogether just. Who taught us respect for women? Our heathen ancestors. Who laid down for us the faith that the life of a free nation is public, and its actions bear lasting fruit because they are grounded in the will of the people? Our heathen ancestors. Who bade us not only hate but despise the baser forms of vice, and hold up an ideal of clean and valiant living which European Christianity could assimilate, so becoming a creed not only of God-fearing but of self-respecting men? Our heathen ancestors. Among those ancestors we may count, besides the Germans, the Scandinavians, whose invasions contributed in a notable proportion to the English stock of descent. Their customs, about the time of the Norman Conquest, were still much like those described in the "*Germania*." Regularity and even formality had been introduced in public business, but there was no defined executive power.

Now there are two cautions to be observed here. First, it would be foolish to claim for the Teutonic nations or kindred an exclusive title to any one of the qualities noted by Tacitus. Taken singly, we may find parallels to most of them in various regions of the world at various times. The Greeks described by Homer, for example, are much nearer to the Germanic ideal than Plato's contemporaries; and it is more than probable that in the Germans Tacitus found a living image of regretted virtues which were be-

⁴The passage referred to (c. 8) is so brief as to leave it in some obscurity both what the facts were and how Tacitus understood them. Some anthropologists think the words "*sanctum aliquid et providum*" point to a survival of prehistoric magical beliefs or of matriarchal observance. That there is a religious element of some kind is clear enough.

lieved to have flourished under the Roman republic. Other analogies have no doubt existed in other branches of the Indo-European family, and among people who are not Indo-European at all. It is enough to mention the Celts of the dimly discerned heroic age—the days to which the legendary disputes of Ossian and Patrick were assigned—and the Arabs of the time before Islam. But it remains a notable and, I think, a singular fact that the Germanic type was preserved as a whole, and so little affected by foreign influence, at the very time when the civilization of the Mediterranean lands had become cosmopolitan, and both Hellenic and Roman manners were infected with Asiatic corruption as well as Asiatic enthusiasm. Whatever may be the right explanation of this, the constant affection of the Common Law for both freedom and publicity does appear to owe something to it. The second caution is that, in claiming justice for our pagan ancestors, I have no desire to be less than just to the Church. There is no ground for any polemical inference. All the Germanic virtues, in so far as they agree with the precepts and commendations of the Church, belong to the law of nature in the regular scholastic usage of the term: that is to say, they are the following of general rules binding on all men as moral and rational beings, and discoverable by human reason without any special aid of revelation. According to the accepted teaching of the Schoolmen, if I am rightly informed, there is no sufficient cause, indeed no excuse, for man even in his fallen state not to know the law of nature; his defect is not in understanding but in will, and his works are unacceptable for want of obedience rather than of knowledge. What we have said, therefore, of the unconverted Germans might be expressed in another way by saying that they kept a less corrupted tradition of natural law than most other heathens; and I believe this would not involve any theological indiscretion. Indeed it might be a pious or at least an innocent speculation for an orthodox historian to surmise that herein they were special instruments of a dispensation outside or antecedent to the ordinary means of grace; the like assertion, at any rate, has constantly been made concerning the Roman Empire. It is embodied in the most striking manner by the legend of Trajan's miraculous translation to Paradise, the reward of a single act of justice;⁵ and this is the more notable when we remember that Trajan had authorized the persecution of Christians, though

⁵"Qui fuerat iustus paganus factus est bonus christianus." Benvenuto da Imola on Dante, Par. xx. *q.v.*, or any other good commentator.

with reluctance. The same conception is the very groundwork of Dante's treatise on Monarchy. Moreover we shall not forget that the Teutonic ideal has been exalted by writers who were good churchmen enough according to any test short of strict Roman orthodoxy, and in terms both stronger and wider than any that I have thought fit to use. But I do not call these champions in aid. It is not our business either to support or to contravene the Anglo-Saxon zeal of a Kemble, a Kingsley or a Freeman, when we can find everything we need for our particular purpose without going outside the text of Tacitus and the judicial caution of Gibbon's comment thereon. Perhaps it is needless to disclaim any such extravagant assertion as that the Angles and Saxons and Norsemen who settled in Britain were better men than their kinsfolk of the Continent. We know that they had the good fortune to settle on an island.

When we speak of the Germanic type and traditions as having persisted, we do not affirm that our remote forefathers' ideals of publicity, freedom, individual self-respect, and what else may be discoverable in our authorities or fair matter of inference, have enjoyed an unbroken supremacy, still less a manifest one, throughout English history. There have always been adverse influences at work, and more than once they have seemed on the point of prevailing for good and all. Neither is it denied that there are reasonable and inevitable limits to the application of these ideals. Any civilized jurisprudence, for example, must pay some regard to the existence of state secrets which it would be dangerous to the common weal to disclose, and it must afford some protection to domestic and professional confidence; while it will not include in the name of personal freedom an unlimited franchise to defy the law and its officers, although there are people who behave as if it were so and even pretend to think so. The most we can expect is to find, as we do find, that the tradition of public life and common counsel has never been quite inoperative; that the rulers who have been most masterful in fact have been careful at least to respect it in form; and that open defiance of it has always been disastrous to those who ventured on such courses. The Tudors, by judicious use of methods which were on the whole formally correct (whatever historians or moralists may have to say to other aspects of them), gained far more real power than that which the Stuarts, often with quite a fair show of reasons on their side, lost by relying on the King's extraordinary privileges against Parliament and the

common law. It is needless to repeat this familiar story, which I place among the things assumed to be sufficiently known.

Archaic virtues, like most good things in this world, are not without their drawbacks. Whatever else they are, they cannot help being archaic, and accordingly they go down to posterity clothed in antique and rigid forms. Those forms were once an effective and probably a necessary safeguard against a relapse into mere anarchy, the state of war in which every man's hand is against every other man's. But the rigidity which made them effectual for this purpose will make them, in a more settled order of things, an equally stubborn obstacle to improvement. Archaic justice binds the giants of primeval chaos in the fetters of inexorable word and form; and law, when she comes into her kingdom, must wage a new war to deliver herself from those very fetters. This conflict of substantial right and formalism is never exhausted; it is a perennial adventure of the Common Law, and perhaps the most arduous of all.⁶

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⁶This is the first of a series of lectures delivered by Sir Frederick Pollock at Columbia University in October, 1911.